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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian,

Respondent.

BRIEF FOR PETITIONER

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Statutes Involved	6
Specification of Errors	7
Summary of Argument	8
POINT I: The Custodian vested only the interest of AKM, if any, in the debt owed by ASCAP	12
POINT II: The whole of AKM's interest in the ASCAP debt passed to Propper upon his appointment as Temporary Receiver. Therefore, the Custodian's vesting order seized nothing	14
Title to all of AKM's New York assets vested in Propper, as Temporary Receiver, as a part of the plan of §977-b to achieve *in rem* jurisdiction	17
Apart from the title vested in the temporary §977-b receiver for purposes of the seizure required to perfect *in rem* jurisdiction, Propper acquired rights as such temporary receiver which are superior to those of the Custodian who claims only through AKM	22
The Temporary §977-b Receiver is not Comparable with the Temporary Equity Receiver	23

PAGE

Propper's Rights as Temporary Receiver—Irrespective of Whether Labeled "Title" or "Right to Possession"—Are Superior to Those of the Custodian Who Claims Only Through AKM 31

POINT III:

The Freezing Controls Did Not Preclude Propper, as Permanent Receiver, from Taking the ASCAP Debt 33

Propper, as Permanent Receiver, took title to the ASCAP debt as of the commencement of the §977-b Proceeding. Therefore, his rights as Permanent Receiver were unaffected by Executive Order 8389 34

Section 5(b) of the Trading With the Enemy Act did not authorize the President to abrogate the power of the State of New York to deal with the ASCAP Debt through the §977-b Proceeding 35

The History of Sec. 5(b) 39

The Joint Resolution did not empower the President to suspend the operation of §977-b of the New York Civil Practice Act 41

As construed by the Federal Executive and the New York Courts, the Joint Resolution permitted §977-b to Vest Title to the ASCAP Debt in Propper, as Permanent Receiver 49

PAGE

Conclusion:

The Judgments of the Court of Appeals and of the District Court should be reversed 54

Appendix:

New York Civil Practice Act, §977-b ..... 55 to 63, inclusive

Joint Resolution of May 7, 1940 64-65

Citations

Cases:

Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300 34

Addy Co. v. U. S., 264 U. S. 239 38

Bornheimer v. Converse, 206 U. S. 516 28

Bollack v. Societe General etc., 263 App. Div. 601 52

Cable & Wireless, Ltd. v. Yokahama Specie Bank, 191 N. Y. Misc. 567 52

Campbell v. Galeno Chemical Co., 281 U. S. 599 ..... 41, 43

Central Union Trust Co. v. Garvan, 254 U. S. 554 12

Chase National Bank v. Reinicke, 76 N. Y. S. 2d 63 13

City of Chicago v. Fielderest Dairies, Inc., 316 U. S. 168 21

Clark v. Chase Natl. Bank et al., Civ. No. 44-617, S. D. N. Y. 52

Clark v. Edmunds, 73 F. Supp. 390 13

Clark v. Taylor, 163 F. 2d 940 3

Clark v. Williard, 294 U. S. 211 ..... 17, 36

Converse v. Hamilton, 224 U. S. 243 ..... 22, 28

PAGE

Cooper v. Reynolds, 11 Wall. 308 18
Crowell v. Benson, 285 U. S. 22 21

Davies Warehouse Co. v. Bowles, 321 U. S. 144 38
Decker v. Gardner, 124 N. Y. 334 24
Drewry v. Onassis, 188 N. Y. Misc. 912, affd. 272 App. Div. 870 52

Elkay Refrigerator Corp. v. Savory, Inc., 57 F. 2d 161 20
Embree v. Hanna, 5 Johns. 101 20
Everett v. Judson, 228 U. S. 474 34

Fairbanks Steam Shovel Co. v. Wills, 240 U. S. 642 34
Farmers Loan & T. Co. v. Lake St. Elev. R. Co., 177 U. S. 51 ..... 31, 34
Fielmann v. Brunner, 2 Hun 354 20
Frank v. Lutton, 267 App. Div. 703 28

Hall v. Holland House Co., 12 N. Y. Misc. 55 34
H. P. Welch Co. v. New Hampshire, 306 U. S. 79 ..... 38, 48
Harris v. Balk, 198 U. S. 215 18
Hawaii v. Mankichi, 190 U. S. 197 47
Helme v. Buckelew, 229 N. Y. 363 17
Herring v. N. Y. L. E. & W. R. Co., 105 N. Y. 340 24
Hervey v. Rhode Island Locomotive Works, 93 U. S. 664 35
Higgins v. Worthington, 90 Hun 436; 35 N. Y. Supp. 815 34
Hoyt v. Sprague, 103 U. S. 613 36

In re Berry, 26 Barb. (N. Y.) 55 34
In re Denton & Haskins Music Pub. Co., 10 F. Supp. 802 ..... 31, 34
In re French, 181 App. Div. 719 25

PAGE

In re Lenox Corp., 57 App. Div. 515, affd. 167 N. Y. 623 31
In re People by Beha, Supt. of Ins., 256 N. Y. 177, cert. den. 284 U. S. 687 13
Isenberg v. Trent Trust Co., 26 F. 2d 609, affd. on rehearing 31 F. 2d 553, cert. den. 279 U. S. 862 13

James v. Dravo Contracting Co., 302 U. S. 134 36
Johnson v. Rayner, 25 App. Div. 598 28
Johnson v. U. S., 163 Fed. 30 47

Kahn v. Garvan, 263 Fed. 909 ..... 12, 13
Keeney v. Home Ins. Co., 71 N. Y. 396 24
Keifer & Keifer v. R. F. C., 306 U. S. 381 47
Kline v. Burke Construction Co., 260 U. S. 226 22
Kohlsaat v. Murphy, 96 U. S. 153 20

Lafayette Trust Co. v. Biggs, 213 U. S. 280 32
Lamp Chimney Co. v. Ansonia Brass etc. Co., 91 U. S. 656 20
Leeds v. Guaranty Trust Co., 65 N. Y. S. 2d 431, affd. 297 N. Y. 1019 52
Lion Bonding & S. Co. v. Karatz, 262 U. S. 77 22
Logan v. Greenwich Trust Co., 144 App. Div. 372, affd. 203 N. Y. 611 20
Lynch v. Crary, 52 N. Y. 181 20

Mathews v. Mathews, 247 N. Y. 32 17
Mathews v. Mathews, 240 N. Y. 28 20
Matter of Atty. Gen. v. Atlantic Mutual Life Ins. Co., 100 N. Y. 279 32
Matter of Christian Jensen Co., 128 N. Y. 550 31
Mayer v. Garvan, 270 Fed. 229 13
Metallé-Chemical Corp. v. Banque Transatlantique, S.A., 188 N. Y. Misc. 596 52

PAGE

Meyer v. Petrograd Metal Works, 256 App. Div. 1077, app. den. 281 N. Y. 887 34
Michigan v. Michigan Trust Co., 286 U. S. 334 30
Miller v. Rouse, 276 Fed. 715 ..... 12, 13
Miller v. U. S., 294 U. S. 435 ..... 38, 41, 43
Missouri K. T. R. Co. v. Haber, 169 U. S. 613 ..... 38, 48
Musser v. Utah, 333 U. S. 95 21
Mutual Brewing Co. v. New York & C. P. Ferry Co., 16 App. Div. 149 25

Natl. Park Bank v. Clark, 92 App. Div. 262 28
Nealis v. American Tube & Iron Co., 150 N. Y. 42 27
New York Title & Mtge. Co. v. Polk Arms, Inc., 262 N. Y. 21 ..... 25, 28

Oliner v. Amer. Oriental Banking Corp., 252 App. Div. 212, affd. 277 N. Y. 588 ..... 23, 34
Osaka Shoshen Kaisha Line v. U. S., 300 U. S. 98 30

Palmer v. Massachusetts, 308 U. S. 79 38
Palmer v. Texas, 212 U. S. 118 ..... 31, 34
Pampagna Sugar Mills v. Trinidad, 279 U. S. 211 30
Panama Railroad Co. v. Johnson, 264 U. S. 375 21
Pennington v. Fourth Natl. Bank, 243 U. S. 269 ..... 17, 18
Pennoyer v. Neff, 95 U. S. 714 17
Polish Relief Comm. v. Banca Nationala Rumaniei, 288 N. Y. 332 ..... 49, 50
Porter v. Sabin, 149 U. S. 473 35
Prince v. Schlesinger, 116 App. Div. 500 28
Propper v. Buck, 32 N. Y. S. 2d 103 5
Propper v. Buck, 263 App. Div. 948 5
Propper v. Buck, 178 N. Y. Misc. 76 5
Propper v. Taylor, 186 N. Y. Misc. 70, affd. 270 App. Div. 890 ..... 5, 6

PAGE

Propper v. Taylor, 186 N. Y. Misc. 72 mod. & affd. 270 App. Div. 890 ..... 5, 6

Railroad Comm. of Texas v. Pullman Co., 312 U. S. 496 21
R. & L. Goldmuntz, Sprl. v. Fisher, 54 N. Y. S. 2d 635 52
Richbourg Motor Co. v. U. S., 281 U. S. 528 44

Sanders v. Armour Fertilizer Works, 292 U. S. 190 20
Schechter v. U. S., 295 U. S. 495 36
Security Savings Bank v. California, 263 U. S. 282 17
Security Trust Co. v. Dodd, 173 U. S. 624 36
Sigua Iron Co. v. Brown, 171 N. Y. 488 25
Singer v. Yokahama Specie Bank, 293 N. Y. 543 52
Spector Motor Service, Inc. v. McLaughlin, 323 U. S. 101 21
Stoehr v. Wallace, 255 U. S. 239 12
Stokes v. Hoffman House, 167 N. Y. 554 25
Suomen Pankki v. Bell, 80 N. Y. S. 2d 821 52

The Pietro Campanella, 47 F. Supp. 374 13

U. S. v. Bank of N. Y. & Trust Co., 296 U. S. 463 ..... 22, 48
U. S. v. Butler, 297 U. S. 1 35
U. S. v. Dickerson, 310 U. S. 554 47
U. S. v. The Antoinetta, 153 F. 2d 138 13
U. S. v. The San Leonardo, 51 F. Supp. 107 13
U. S. v. Amer. Trucking Assns., 310 U. S. 534 47
U. S. ex rel. Atty. Gen. v. Delaware & H. Co., 213 U. S. 366 21
U. S. Trust Co. v. N. Y. W. S. & R. R. Co., 101 N. Y. 478; s. c. 42 Hun 341 24

West Virginia P. & P. Co. v. People's Home Journal, Inc., 233 App. Div. 376 20

PAGE

White v. Ewing, 159 U. S. 36 35
Wiswall v. Simpson, 14 How. (U. S.) 52 31
Wright v. Mountain Trust Bank, 300 U. S. 440 44

Yonlee v. Lavender, 21 Wall. 276 36
Yonkers v. U. S., 320 U. S. 685 38

CONSTITUTION AND STATUTES

U. S. Constitution
10th Amendment 10, 35
14th Amendment 8, 9, 16, 17

Joint Resolution of May 7, 1940, 54 Stat. 179 10

Trading with the Enemy Act, 40 Stat. 411, as amended 40 Stat. 535 and 40 Stat. 966 Sec. 5(b) 10, 11, 33, 36-40

N. Y. Civil Practice Act
Secs. 902-973 49
Sec. 977-b 17
Subds. 1, 2, 4 ..... 9, 17, 18, 19
5 ..... 17, 18
12 ..... 29, 30
19 ..... 8, 9, 14, 18, 19, 21, 23, 28, 30
20 30

N. Y. General Corporation Law
Sec. 162 ..... 19, 27, 29
168 29
169 29

Miscellaneous

1 Clark, Receivers, 2d. Ed.
Sec. 344 31
345 28

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HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of A.K.M.,

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian,

Respondent.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 169 F. 2d 324. The opinion of the District Court (I R. 143) is reported at 70 F. Supp. 202. The opinion of the Court of Appeals dismissing a prior appeal for want of a final judgment is reported at 163 F. 2d 940.[1]

1 The record here consists of two records filed in the Court of Appeals. The first record was filed in the appeal found to be premature by the Court of Appeals. The second was the supplemental record filed when the Court of Appeals took cognizance of the judgment as final. References herein to the record are made as follows:

Record on premature appeal: (I R.)
Supplemental record: (II R.)

Jurisdiction

The jurisdiction of this court is founded on Sec. 1254 of Title 28 of the United States Code, this Court having granted a writ of certiorari herein on January 3, 1949, limited to questions 1 and 2 presented by the petition for the writ.

Statement of the Case

The facts are not in dispute.

This action was instituted in the District Court for the Southern District of New York on April 22, 1946 by the Alien Property Custodian to enforce his Vesting Order 2097 (1 R. 112) by which he purported to vest the right, title and interest of certain named European organizations in royalties alleged to be owing under licenses granted by such societies for the performances of musical compositions.

Vesting Order 2097 is here involved insofar as it sought to vest the "right, title, interest and claim" of an Austrian corporation, Staatlich Genehmigte Gesellschaft der Autoren, Komponisten und Musikverleger (hereinafter called "AKM") in accrued royalties owed to AKM by defendant, American Society of Composers, Authors and Publishers (hereinafter called "ASCAP").

Petitioner is the Receiver of the property and assets of AKM in the State of New York. He was so appointed in an action brought in the Supreme Court of the State of New York under §977-b of the N. Y. Civil Practice Act (1 R. 8, 49-51, 56-60). Petitioner had been litigating against ASCAP in the New York Courts for recovery of said debt for nearly five years prior to the commencement of the instant action by the Custodian.

Petitioner was named as a co-defendant with ASCAP by Count 2 of the complaint which sought a declaratory judgment that, by virtue of Vesting Order 2097, the Custodian had acquired full title to the debt; that Petitioner had no title or interest therein; and that Petitioner's purported acquisition of title to the debt was null and void as against the Custodian. In addition, the complaint sought judgment against ASCAP requiring payment of the debt to the plaintiff as against the Petitioner (I R. 7-11, 15).

As between plaintiff and Petitioner, Propper, the issues were determined on Propper's motion for judgment on the pleadings or for summary judgment and on plaintiff Clark's cross motion for the same relief (I R. 2, 70, 92). As between plaintiff and ASCAP, the issues were disposed of by a stipulation under which ASCAP consented to judgment for Clark in the sum of $46,839.54 (II R. 4-6).

On February 10, 1947, the District Court made a declaratory judgment granting the relief sought by the plaintiff and declaring that Petitioner, as receiver of the property and assets within the State of New York of AKM, acquired no right, title or interest in or to the debt owed to AKM by ASCAP (I R. 152-153). Petitioner appealed from this judgment to the Court of Appeals for the Second Circuit. This appeal was dismissed as not being final because the action had not been disposed of finally as to Petitioner's co-defendant, ASCAP. *Clark* v. *Taylor*, 163 F. 2d 940. Thereafter, on November 21, 1947, the District Court rendered judgment pursuant to the stipulation (II R. 4-6) over Petitioner's objections (II R. 7-11) in favor of the plaintiff against ASCAP for $46,839.54 (II R. 25-26). This was the sum stipulated by ASCAP to be owing to AKM. The judgment having thus been made final, Petitioner appealed both judgments to the Court of Appeals for the

Second Circuit (11 R. 27). On August 3, 1948, the Court of Appeals unanimously affirmed both judgments (11 R. 40).

On June 9, 1941 a creditor of AKM instituted an action in the Supreme Court of New York, New York County, pursuant to §977-b of the New York Civil Practice Act, alleging that AKM had been liquidated and had assets within the State of New York (1 R. 9, 31, 39). The complaint prayed the appointment of a receiver of such assets and the distribution thereof pursuant to §977-b. Summons in this action was served on AKM by publication (1 R. 56).

On June 12, 1941, by order of the Supreme Court of New York, defendant, Propper, was appointed temporary receiver of the New York assets of AKM. The order directed him "to take, receive and reduce to his possession," all the assets of AKM within the State of New York. The order also conferred upon him "all the powers and duties * * * as are possessed by and conferred upon Receivers and Trustees by the laws of the State of New York" (1 R. 50). On September 29, 1941, the Court adjudged Propper permanent receiver of the assets of AKM (1 R. 56-60).

In the interval between these two appointments, on June 14, 1941, Executive Order No. 8389 (5 F. R. 1400) was amended so as to extend the freezing controls to Austria and its nationals (Executive Order No. 8785, 6 F. R. 2897).

On July 9, 1941, Propper, as temporary receiver, served on ASCAP a copy of the order of his appointment accompanied by a demand on ASCAP to pay to him all moneys was to put Propper in possession of the debt owed by due to AKM (1 R. 32, 52-55, 76). The effect of this demand ASCAP to AKM (§977-b, Subd. 20).

On July 29, 1941, defendant, Propper, as temporary receiver, began action against ASCAP in the Supreme Court of New York to recover the debt owed by ASCAP to AKM

(1 R. 78). Extensive pre-trial proceedings were had in this action.[2]

Meanwhile, creditors' claims aggregating more than $90,000 were filed with Propper as receiver (1 R. 77, 78).

Propper's suit had not yet proceeded to trial when, by Vesting Order No. 2097, signed September 4, 1943 (1 R. 112-115), the Alien Property Custodian determined that AKM and its members were nationals of Austria and purported to vest in the Custodian "All right, title, interest and claim of whatsoever kind or nature" of AKM and its members in the license agreement between AKM and ASCAP and of moneys accrued or to accrue thereunder. On September 11, 1943, the Custodian made demand upon ASCAP for payment of the debt due AKM. ASCAP refused the demand (1 R. 10, 67). The Custodian never made any demand on Propper prior to instituting the instant action below.

ASCAP, as defendant in the action brought by Propper against it in the N. Y. Supreme Court, moved to substitute

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2 Propper's right to examine ASCAP before trial affirmed (*sub. nom. Propper* v. *Buck*, 32 N. Y. Supp. 2d 103). ASCAP's motion to dismiss complaint denied. (*Sub. nom. Propper* v. *Buck*, N. Y. Law Journal, October 29, 1941, affirmed 263 App. Div. 948, 34 N. Y. Supp. 2d 134). ASCAP's motion to stay trial denied with leave to renew. (*Sub. nom. Propper* v. *Buck*, 178 Misc. 76, 33 N. Y. Supp. 2d 11). Later ASCAP's motion to stay the trial was renewed and granted on May 16, 1942. This determination was affirmed. (*Sub. nom. Propper* v. *Taylor*, 265 App. Div. 1040). ASCAP's motion for summary judgment denied (*sub. nom. Propper* v. *Taylor*, 186 Misc. 70, 58 N. Y. Supp. 2d 829, aff'd. 270 App. Div. 890, 62 N. Y. Supp. 2d 602). Order on ASCAP's motion directing that Custodian voluntarily procure himself to be made a co-plaintiff or be foreclosed of any interest in the subject matter of the action. (*Sub. nom. Propper* v. *Taylor*, 186 Misc. 72, 58 N. Y. Supp. 2d 831, modified by eliminating direction with respect to Custodian in 270 App. Div. 890, 62 N. Y. Supp. 2d 601). The order staying the case was vacated in January, 1946. This determination was affirmed on appeal (*Propper* v. *Taylor*, App. Div., 1st Dept., April 16, 1946 [1 R. 133]).

the Custodian as plaintiff in that action in the stead of Propper. The Custodian appeared specially contesting the service of the motion on him. The Court directed the Custodian to join the action as a co-plaintiff and ordered that, unless he did so within sixty days, he would be foreclosed of any right or interest in the subject matter of the action (*Propper* v. *Taylor*, 186 Misc. 70, 58 N. Y. Supp. 2d 829). Both ASCAP and the Custodian appealed the order to the Appellate Division of the New York Supreme Court. This order was modified by eliminating the direction to the Custodian to join as co-plaintiff and, as so modified, was affirmed (270 App. Div. 890, 62 N. Y. Supp. 2d 601). Simultaneously, on April 16, 1946, the Appellate Division unanimously affirmed an order vacating the stay of the action previously secured by ASCAP, restored the case to the trial calendar, and authorized Propper forthwith to proceed with his action against ASCAP (I R. 133).

Six days later, on April 22, 1946, the Custodian commenced the instant suit. In the interval between this date and the making of Vesting Order 2097 on September 4, 1943, the Custodian did nothing to enforce the Vesting Order. On the contrary, he resisted successfully all efforts to bring him into the Supreme Court action brought by Propper against ASCAP. He instituted this action only a few days after Propper, following five years of effort, had succeeded in clearing the way for an immediate trial of his action against ASCAP in the State Court.

Statutes Involved

Section 977-b of the New York Civil Practice Act (Appendix pp. 55-63); Joint Resolution (Public Resolution No. 69, 76th Congress), approved May 7, 1940, amending Section 5(b) of the Trading with the Enemy Act, 54 STAT 179 (Appendix pp. 64-5).

Specification of Errors

1. The Courts below erred in holding that the Custodian, claiming only the interest of AKM, succeeded by his Vesting Order in seizing the ASCAP debt to the exclusion of Petitioner, who, as Temporary Receiver under §977-b of the N. Y. Civil Practice Act, had been vested with the ASCAP debt several years prior to the issuance of the Custodian's Vesting Order.

2. The Courts below erred in failing to find that Petitioner was vested with the ASCAP debt on his appointment as such Temporary Receiver and that AKM had no interest therein which could be seized under Respondent's subsequent Vesting Order.

3. The Courts below erred in holding that Executive Order 8389, issued pursuant to Sec. 5(b) of the Trading with the Enemy Act, prevented Petitioner, as Permanent Receiver, from taking and administering the ASCAP debt in the §977-b receivership proceeding as against the Custodian's subsequent Vesting Order.

4. The Courts below erred in failing to find that the State of New York had power to take and deal with the ASCAP debt in the §977-b proceeding and that the exercise of such power was in harmony with Sec. 5(b) of the Trading with the Enemy Act and Executive Order 8389.

5. The Courts below erred in holding that Executive Order 8389 abrogated the power of the State of New York to take and deal with blocked funds in accordance with §977-b of the N. Y. Civil Practice Act.

6. The Courts below erred in failing to dismiss Respondent's complaint as to Petitioner.

Summary of Argument

I. Custodian's Vesting Order 2097 purported merely to seize the "right, title, interest and claim" of AKM in the ASCAP debt. Therefore, respondent was entitled only to AKM's interest in that debt, if any, on the effective date of the putative seizure. The Vesting Order did not enlarge that interest.

II. Sec. 977-b of the N. Y. Civil Practice Act provides a plan for the administration of all the local assets of defunct foreign corporations. The plan is to marshal and distribute such assets through a receiver appointed in an action instituted against the foreign corporation. Such an action may be begun by personal or constructive service of the summons. If begun by constructive service, a temporary receiver *must* be appointed. Under the statute (subd. 19), the temporary receiver, upon his appointment, is endowed with title to all of the local assets of the defunct foreign corporation. The coincidence of the appointment of the temporary receiver and the simultaneous vesting in him of title to *all* the assets effects a seizure of the *res*. It is only in this way that the court secures jurisdiction to deal with all the assets of the defunct foreign corporation, where the latter cannot be personally summoned, consistently with the due process clause of the 14th Amendment.

Since under §977-b (subd. 19), Petitioner took title to the ASCAP debt before Executive Order 8389 became effective as to Austrian nationals and long before the issuance of the Custodian's Vesting Order, Petitioner—not Respondent—was entitled to recover the debt from ASCAP.

The Courts below mistakenly held that the temporary §977-b receiver is a statutory counterpart of the temporary equity receiver. They concluded that since under the New

York decisions, the latter is not endowed with title, but merely the right to possession, so the temporary §977-b receiver must be without title to the assets of defunct foreign corporations. Such a conclusion was erroneous because there is no analogy in procedure, function or purpose between the totally distinct receivers. The temporary §977-b receiver is the device through whom the court seizes the *res* at the commencement of the action for purposes of *in rem* jurisdiction, while the temporary equity receiver does not require title to perform his function as custodian of property to abide the final judgment. No other seizure device is provided by §977-b as a basis for *in rem* jurisdiction. The statute would violate the due process clause of the 14th Amendment unless the temporary §977-b receiver took title in order to seize the *res* under subd. 19. The appointment of the temporary equity receiver is wholly discretionary. But subd. 4 of 977-b makes the appointment of a temporary receiver *mandatory* at the commencement of an action which is to proceed on constructive service. The temporary §977-b receiver is *sui generis*. No analogy may aptly be made of his powers, purpose or function to those of temporary equity receivers or temporary statutory receivers of domestic corporations. Even the latter receiver takes title to assets of a domestic corporation under New York decisions, and any analogy would require a similar holding in the case of the temporary §977-b receiver.

The rights of the latter—whether called "title" or "right to possession"—were superior to those of AKM through whom Respondent claims. The Custodian's Vesting Order seized only the rights of AKM. The Courts below erroneously gave the Vesting Order a force greater than it purported to have. They permitted Respondent to take the ASCAP debt as against Petitioner. AKM could not have done so.

III. Petitioner, as Permanent Receiver, took title to the ASCAP debt as of the commencement of the 977-b proceeding. The freezing controls of Executive Order 8389 were not then applicable to property of Austrian nationals. Therefore, Executive Order 8389 has no application to this case. Assuming, however, that Petitioner's rights as Permanent Receiver were subject to the freezing controls, these did not prevent him from taking title to the ASCAP debt.

Under the 10th Amendment, the states have exclusive power to deal with local property. §977-b was the exercise of this exclusive power by the State of New York. Sec. 5(b) of the Trading with the Enemy Act, upon which Executive Order 8389 rests, did not authorize the President to abrogate the power of New York to deal with the ASCAP debt in the §977-b proceeding.

In issuing Executive Order 8389, the President exercised the power granted to him by the Congressional Joint Resolution of May 7, 1940, amending Sec. 5(b) of the Trading with the Enemy Act. The Executive Order was issued in time of peace. The §977-b proceeding here involved was a peacetime transaction. The impact of Sec. 5(b) and Executive Order 8389 on the §977-b proceeding is to be determined by their peacetime force. The Courts below erred in giving to Sec. 5(b) and the Executive Order their war-time force retrospectively against the peacetime transaction here involved.

On Sept. 29, 1941, final judgment was entered against AKM appointing Petitioner permanent §977-b receiver. Sec. 5(b) was then a measure designed solely to protect certain property in the United States, owned by nationals of countries invaded by the Axis, against conquest. It authorized the President to set up a system of freezing controls for screening transactions in such property. Congress made it clear that:

1. No transaction in such property was absolutely proscribed;

2. Each such transaction was to be scrutinized;

3. If the transaction were genuine, the President was to "in no way interfere";

4. The property was in no way expropriated;

5. The property was to be available for the satisfaction of the claims of American citizens.

Sec. 977-b was wholly consistent and in harmony with the system of freezing controls established by Sec. 5(*b*).

Under §977-b, the State of New York could seize title to the ASCAP debt for purposes of *in rem* jurisdiction in the proceeding against AKM. However, payment of the ASCAP debt to Petitioner as Receiver was at most suspended, pending the screening process. After payment of the debt to Petitioner, both he and the State Court were bound by the freezing controls in making distribution to claimants. Distribution could be made to American citizens without hindrance—as Congress intended. Distribution to blocked nationals was suspended, pending the screening process—again, precisely as Congress intended. Thus, the purpose of Sec. 5(b) was more fully served under §977-b. Not one dollar of the ASCAP debt was any more likely to fall into Axis conquest through the §977-b receivership than through ASCAP's hands. Since §977-b was in harmony with Sec. 5(b), it was not abrogated, as to blocked funds, by the federal statute.

The Secretary of the Treasury ruled that Executive Order 8389 did not abrogate the power of New York to seize

blocked funds for purposes of local litigation. He held that merely payment of blocked funds to satisfy a judgment obtained in such a proceeding was subject to the screening process. The New York Courts, with the sanction of the United States as *amicus curiae*, have consistently followed this ruling.

POINT I

The Custodian vested only the interest of AKM, if any, in the debt owed by ASCAP.

The Custodian issues two types of vesting order. One—the so-called "*res*" vesting order—is a seizure of designated property. It is an assertion by the Custodian of a right to possession. Such a vesting order determines no rights in the property but merely that the Custodian is entitled to possession. The ultimate right to the property is determined in a later suit against the Custodian under §9 of the Trading with the Enemy Act. *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 569; *Stoehr v. Wallace*, 255 U. S. 239, 245-6.

The other type—the "right, title and interest" vesting order—is a seizure of the enemy's interest in designated property. Such a seizure does not determine the *quantum* of that interest. The Custodian merely steps into the enemy's shoes. The seizure can be executed only after the enemy's interest has been determined. *Miller v. Rouse*, 276 F. 715, 716; *Kahn v. Garvan*, 263 F. 909, 912.

Vesting Order 2097, under which Clark here claims, is of the latter variety. By this order, the Custodian did not seize the *res*, i.e. the debt owing from ASCAP to AKM. He seized only the "right, title, interest and claim" of AKM in this debt (I R. 112-116). The complaint so alleges (I R.

10). Plaintiff's affidavit so concedes (I R. 109). The Custodian is limited to that interest. Such interest is neither enlarged nor contracted by the seizure.

> "Upon these assumptions, it is necessary briefly to consider the nature of the 'right, title, and interest' which was the subject of the putative capture. *It did not profess to be greater than the right of the enemies as cestuis que trustent*, and it did not in law change the substance, or the incidents, of the right itself, any more than if, for example, it had been an unliquidated claim for breach of contract. Nor, indeed, could the Alien Property Custodian under such a demand, or unless he asserted a legal right to the securities themselves, by capture change the character of the enemy's right as obligee. If it be a chose in action, subject to an accounting as a condition of its assertion, he must submit to some judicial determination between himself, as captor, and the trustee as obligor. Such a demand neither enlarges nor contracts the rights seized." *Kahn* v. *Garvan*, 263 Fed. 909, 912 (L. Hand, *J.*). (Italics supplied.)

The cases uniformly so hold. *Miller* v. *Rouse*, 276 Fed. 715, 716; *U. S.* v. *The Antoinetta*, 153 F. 2d 138, 143; *Isenberg* v. *Trent Trust Co.*, 26 F. 2d 609, 613, *aff'd. on rehearing* 31 F. 2d 553, *cert. den.* 279 U. S. 862; *Mayer* v. *Garvan*, 270 Fed. 229, 239; *In re People by Beha, Supt. of Ins.*, 256 N. Y. 177, 187, *cert. den.* 284 U. S. 687; *U. S.* v. *The San Leonardo*, 51 F. Supp. 107, 109; *The Pietro Campanella*, 47 F. Supp. 374, 377, 380; *Clark* v. *Edmunds*, 73 F. Supp. 390, 392-4; *Chase Nat. Bank* v. *Reinicke*, 76 N. Y. S. 2d 63, 65.

Under Vesting Order 2097, plaintiff, Clark, is thus entitled to whatever interest AKM then had in the ASCAP debt—no more. Petitioner's position is that, as receiver of

the New York assets of AKM, he was vested with the whole of AKM's interest in the ASCAP debt. Therefore, when the Vesting Order was made more than two years later, AKM had no interest in the ASCAP debt. Therefore, the Custodian took nothing by the Vesting Order.

POINT II

The whole of AKM's interest in the ASCAP debt passed to Propper upon his appointment as temporary receiver. Therefore, the Custodian's subsequent vesting order seized nothing.

Acting under §977-b of the New York Civil Practice Act, on June 12, 1941, the New York Supreme Court appointed Propper temporary receiver of the New York assets of AKM, an Austrian national (1 R. 49-50). This appointment antedated June 14, 1941—the day on which the freezing controls of Executive Order 8389 were extended to Austrian nationals (6 F. R. 2897). It antedated September 4, 1943—the day on which Vesting Order 2097 was made (1 R. 10, 112-115).

Therefore, on the date of Propper's appointment as temporary receiver, he acquired—unaffected by any Federal statute or executive order—the interest in AKM's New York assets specified by §977-b of the New York Civil Practice Act. This interest was title to all of AKM's New York assets. Subd. 19 of §977-b so states in the following explicit language:

> "19. Title to all assets, credits, choses in action and property, tangible and intangible, of any and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within

the state of New York shall immediately vest in the receiver upon the making of the order appointing him. . . . "

Despite the unambiguous language of the statute, the Court of Appeals held that Propper, as temporary receiver, took nothing as against AKM or as against the Custodian who merely succeeded to its rights. The Court of Appeals reasoned as follows:

1. "The New York courts have consistently ruled that a temporary receiver *pendente lite* does not obtain title to the property, but has only a right of possession."

2. Since the New York cases "show such general understanding in New York of the restricted rights of a temporary receiver, we should look for clear statutory language to disclose a different intent for this one situation here."

3. No such intent "is to be found in §977-b of the N. Y. Civil Practice Act." Sec. 977-b does not depart from—but follows—the general New York rule, applied to temporary chancery receivers, that the temporary receiver does not take title but, merely, a right to possession.

We submit that the Court of Appeals wholly misconceived §977-b. This is because

(a) §977-b provides a plan for the liquidation and distribution of "all" of the New York assets of defunct foreign corporations. In this plan, the temporary §977-b receiver serves a function wholly different from that

of a temporary equity receiver: The temporary §977-b receiver is the instrument through whom—as in attachment, garnishment, etc.—the Court seizes the *res* to be administered in the *in rem* proceedings envisioned by §977-b where personal service of the summons cannot be made. The equity receiver is merely a custodian who takes possession of the property in order to preserve it pending the outcome of the action. Through the temporary §977-b receiver, the court seizes the *res* at the commencement of the action for purposes of *in rem* jurisdiction. Through the temporary equity receiver the court, having already acquired jurisdiction, preserves the property pending determination of the action.

(b) To hold that the temporary §977-b receiver does not acquire title is to hold that this statute authorizes *in rem* proceedings without prior seizure of the *res*. So construed, §977-b would violate the due process clause of the 14th Amendment to the U. S. Constitution.

(c) §977-b clearly defines the authority vested in the temporary receiver appointed thereunder. No analogy to the authority vested in any other temporary receiver is apt. If such analogy is to be made, the temporary statutory receiver—not the chancery receiver—should be selected for the comparison. Since the temporary statutory receiver takes title, the same result would follow, by analogy, under §977-b.

1. ***Title to all of AKM's New York assets vested in Propper, as temporary receiver, as a part of the plan of §977-b to achieve in rem jurisdiction.***

Sec. 977-b embodies a plan for the distribution of *all* the assets within the State of New York of defunct foreign corporations. The plan is to marshal and distribute such assets through a statutory receiver appointed in an action commenced against the foreign corporation (§977-b, subd. 1, 2; Appendix p. 55). It is competent for the state so to administer the local assets of defunct foreign corporations. *Clark* v. *Williard*, 294 U. S. 211.

Alternative methods are specified for commencement of the action. One is by personal service of the summons. In such case, no temporary receiver can be had. The other is by constructive service of summons. In the latter instance, a temporary receiver "must" be appointed "without notice". Such method is available only where "personal service cannot be effected within the state with due diligence" (§977-b, subds. 4, 5).

The scheme of the statute is clear. Where personal service of summons can be had, the action is to proceed on such service. Where personal service cannot be had with diligence, constructive service of the summons is authorized. However, under the Federal Constitution (14th Amendment), constructive service is effective to confer jurisdiction only where property has been seized at the outset of the action. A judgment in an action thereby instituted is binding only in respect to the property so seized. *Pennoyer* v. *Neff*, 95 U. S. 714, 726, 728, 733; *Security Savings Bk.* v. *California*, 263 U. S. 282, 287; *Pennington* v. *Fourth Nat. Bk.*, 243 U. S. 269, 272; *Helme* v. *Buckelew*, 229 N. Y. 363, 371; *Mathews* v. *Mathews*, 247 N. Y. 32, 34.

Sec. 977-b meets this constitutional dictate by providing for the mandatory appointment of a temporary receiver through whom the seizure is effected. The coincidence of the appointment of the temporary receiver (§977-b, subd. 4) and the simultaneous vesting in him of title to all the local assets (§977-b, subd. 19) effects a seizure of the *res*, namely all the property of the foreign corporation in New York. In this way, all of the New York assets of the foreign corporation may be proceeded against even where personal service is impossible.

Such a seizure device is necessary because the plan of the statute is to deal with *all* the local assets—those known as well as those undiscovered. The usual seizure devices, fashioned to seize a specific *res*, are not adapted to this plan. Attachment (*Cooper* v. *Reynolds*, 11 Wall. 308), garnishment (*Harris* v. *Balk*, 198 U. S. 215) and injunction (*Pennington* v. *Fourth Nat. Bk.*, 243 U. S. 269) are shaped only to the seizure of specific disclosed property and result in a judgment binding only the particular property seized at the outset. By directing the appointment of a temporary §977-b receiver and, simultaneously, vesting him with title to all the assets, *all* of the foreign corporation's local property is seized at the commencement of the §977-b suit and may be dealt with by the judgment therein consistently with the requirements of due process.

Clearly, this is the plan of the statute.

The appointment of the temporary §977-b receiver is inextricably bound up with the constructive service of summons. Only where "personal service cannot be effected within the state of New York with due diligence" is authority given to appoint a temporary receiver (§977-b, subd. 4). Only after a temporary receiver has been appointed is authority given for constructive service of the summons by publication (§977-b, subd. 5).

Further, once the need for constructive service appears, the statute makes the appointment of the temporary receiver mandatory (subd. 4). This mandatory direction is in sharp contrast to the discretion invariably committed to the court in the appointment of the usual temporary equity receiver. The appointment of the temporary §977-b receiver is a "must"—rather than a matter of grace—because upon his appointment, rests the validity of the constructive service.

The provision for appointment of the temporary §977-b receiver "without notice" also emphasizes this conclusion. *Ex parte* action is usual where the purpose of process is seizure for jurisdictional purposes. This is in contrast to the notice required in case of appointment of the usual temporary corporate receiver (N. Y. *General Corporation Law* §162).

Finally, unless *in rem* jurisdiction is acquired by appointing the temporary receiver and vesting him with title to the assets affected, the statute lacks the seizure device required for *in rem* proceedings. There is no provision for attachment, garnishment or other seizure process to effect the *in rem* jurisdiction so clearly contemplated by the statute.

The Court of Appeals failed to perceive the function of the temporary §977-b receiver as a device for perfecting *in rem* jurisdiction. It saw the temporary §977-b receiver only as the statutory counterpart of the usual temporary equity receiver, appointed to preserve property *pendente lite*. Pursuing this analogy, it concluded that, as the latter is without title, so must be the former. This decision was reached notwithstanding the following plain provisions of subd. 19, §977-b:

> "19. Title to all assets, credits, choses in action and property, tangible and intangible, of any and every

kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. * * * "

Even if the statute did not so provide expressly, the same result would follow as a matter of construction. Under New York law, a seizure by attachment for purposes of *in rem* jurisdiction impresses a security title upon the seized property. *Fiedmann v. Brunner* (1874), 2 Hun 354, 356; *Embree v. Hanna*, 5 Johns. 101, 103; *Lynch v. Crary*, 52 N. Y. 181, 184; *Logan v. Greenwich Trust Co.* (1911), 144 App. Div. 372, *aff'd.* 203 N. Y. 611; *West Virginia P. & P. Co. v. People's Home Journal, Inc.* (1931), 233 App. Div. 376, 378; *Sanders v. Armour Fertilizer Works*, 292 U. S. 190, 207; *Elkay Refrigerator Corp. v. Savory Inc.* (C. C. A. 2nd, 1932), 57 F. 2d 161. The seizure through the temporary §977-b receiver affords a similar remedy. It should be similarly construed. *Kohlsaat v. Murphy*, 96 U. S. 153, 159; *Lamp Chimney Co. v. Ansonia Brass etc. Co.*, 91 U. S. 656, 662; *Mathews v. Mathews*, 240 N. Y. 28, 34.

It may be that the temporary §977-b receiver will in fact act to conserve the property which he seizes. But this is purely incidental to his primary function, namely, to seize all of the foreign corporation's property for purposes of *in rem* jurisdiction. Had the New York Legislature chosen a more familiar process of seizure, such as attachment, garnishment, etc., analogy to temporary equity receivership would be unthinkable. The analogy is no more apt merely because the New York Legislature chose the instrumentality of a temporary receivership to effect the seizure of "all the assets" envisioned by §977-b.

The construction placed upon §977-b by the Courts below would make it impossible for this statute to operate within constitutional limitations. Sec. 977-b authorizes a judgment, on constructive service, appointing a permanent receiver to liquidate and distribute "all of the assets" of the defunct foreign corporation in New York. Such a judgment would violate the due process clause of the 14th Amendment unless "all of the assets" were seized at the commencement of the action. (See cases cited *supra* at p. 17). Unless §977-b, subd. 19 is construed to effect such a seizure through the temporary receiver, none is provided for by the statute. The statute, therefore, could not operate within the limitations imposed by due process. The Court of Appeals erred in giving §977-b a construction which would render it open to constitutional objections when a lawful construction is possible and, indeed, is dictated by the clear and apt language of the statute. *U. S. ex rel. Atty. Gen.* v. *Delaware & H. Co.*, 213 U. S. 366, 407; *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 390; *Crowell* v. *Benson*, 285 U. S. 22, 62.

The misinterpretation of §977-b by the Court of Appeals brings into sharp focus this Court's admonition to the lower federal courts against construing state statutes before they have been construed by the state courts themselves. *Musser* v. *Utah*, 333 U. S. 95; *City of Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168, 171; *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 500; *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101.

Sec. 977-b vested title to the ASCAP debt in Propper. By his demand, Propper had taken possession of the debt which was then subject to the control of the state court. By its holding, the Court of Appeals struck down the provisions of the statute which gave Propper title and possession of the ASCAP debt. This was in violation of the full faith and credit clause of the Federal Constitution.

Converse v. *Hamilton*, 224 U. S. 243. In ordering ASCAP to pay the debt to respondent, Clark, as the sole and exclusive owner, it wrested this asset from the possession and custody of the state court in violation of the settled rule of this Court. *U. S.* v. *Bank of N. Y. & Trust Co.*, 296 U. S. 463, 477, 478; *Lion Bonding & S. Co.* v. *Kuratz*, 262 U. S. 77, 88; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229.

2. ***Apart from the title vested in the temporary §977-b receiver for purposes of the seizure required to perfect in rem jurisdiction, Propper acquired rights as such temporary receiver which are superior to those of the Custodian who claims only through AKM.***

The lower courts found it necessary to analogize the temporary §977-b receiver with the temporary equity receiver, in order to deny Propper's title. There was no need to seek any analogy. Sec. 977-b was enacted to achieve a specific purpose, unprovided for elsewhere. This special statute makes comprehensive provision for its expressed plan of liquidation and distribution. The part played by the §977-b receiver, temporary or permanent, is defined in clear and unmistakable terms. The lower courts should have construed the statute as written. They erred in limiting the plain words and purpose of this modern statute by the *dicta* of old chancery cases.

The Court of Appeals reasoned that a temporary §977-b receiver is comparable to a temporary equity receiver; that under New York law the temporary equity receiver does not take title but only a right to possession; and that, therefore, Propper took no title as temporary §977-b receiver.

This reasoning is erroneous in two respects, at least. *First*, the temporary §977-b receiver is not comparable to the temporary equity receiver either in purpose or function.

Second, to say that the standing here of the temporary §977-b receiver depends on whether he took "title" is to beg the question to be decided. Whether Propper may hold the ASCAP debt depends upon the rights which he acquired as temporary receiver not whether these rights add up to the conventional notion of "title".

The Temporary §977-b Receiver is not Comparable with the Temporary Equity Receiver

Sec. 977-b is a special legislative plan for marshalling and distributing, among creditors and stockholders, the New York assets of defunct foreign corporations. *Oliner* v. *American-Oriental Banking Corp.*, 252 App. Div. 212, aff'd. 277 N. Y. 588. The function of the temporary §977-b receiver in this plan (*supra*, pp. 17-21) is merely to effect seizure of the assets for purposes of *in rem* jurisdiction and for this purpose he has title (§977-b, subd. 19). Neither the temporary equity receiver nor the temporary statutory receiver (appointed in proceedings against domestic corporations) has a comparable function. Strictly speaking, the temporary §977-b receiver is not to be compared with either of these. He is *sui generis*. Excepting only this case, we have found no instance in which such a comparison has been made.

Even the temporary statutory receiver of a domestic corporation and the temporary equity receiver are contrasting in their functions. The New York Courts have noted, as we shall presently show, that the functions of the temporary equity receiver do not require that he have title. The reverse is true in the case of the temporary statutory receiver.

The power to appoint a temporary equity receiver is an incident to the jurisdiction of the chancery court. This power

does not depend upon statute. It may be exercised irrespective of whether the parties are individuals or corporations. The temporary equity receiver is merely a conservator appointed to care for and preserve property *pendente lite*. He is appointed most commonly in mortgage foreclosure cases. In such cases, he is appointed to impound the rents and profits of the mortgaged property so that they may be applied to the debt when ascertained by the final judgment. The temporary equity receiver represents only the court—not the creditors or other parties. He cannot be appointed to marshal or distribute a corporate debtor's assets. *U. S. Trust Co.* v. *N. Y. W. S. & R. R. Co.*, 101 N. Y. 478, 483, *same case* 42 Hun 341; *Decker* v. *Gardner*, 124 N. Y. 334, 338, 339.

Obviously, in the usual equity case, it is not necessary for the temporary equity receiver to take title to the property in litigation. In the mortgage foreclosure action, he does not need title to the mortgaged property in order to serve his function of collecting the rents and profits. Therefore, the equity courts held that the temporary equity receiver does not acquire title to the subject matter of the litigation. This—and nothing more—is the significance of the *dicta* of the cases cited in the opinion of the Court of Appeals.[3]

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3 The cases cited in the opinion of the Court of Appeals do not, on their facts, support the court's conclusion. *Keeney* v. *Home Ins. Co.* (1877), 71 N. Y. 396 merely held that a temporary equity receiver in an action to dissolve a partnership did not take title to the partnership property so as to void the condition of a fire insurance policy against change of title or possession. *Herring* v. *New York, L. E. & W. R. Co.* (1887), 105 N. Y. 340, 372, 373-375, dealt only with the powers of a temporary equity receiver appointed in a corporate mortgage foreclosure action and of the same receiver appointed as a temporary equity receiver in a parallel equity action—not statutory proceeding—brought by the People to dissolve the corporation. *Decker* v. *Gardner* (1891), 124 N. Y. 334 involved only the question of whether a temporary equity receiver, appointed in an action to foreclose a corporate mortgage, was properly

The temporary statutory receiver of a domestic corporation serves an entirely different purpose. His authority is derived from statute. He is appointed only in proceedings where it is necessary to marshal and distribute corporate assets. He takes the corporate property as the first step in the statutory plan to marshal all the corporate assets in order to secure equality in the payment of claims of creditors by preventing priority and preferences through attachments and judgments.

The distinction between these two temporary receivers was clearly drawn in *New York Title & Mortgage Co. v. Polk Arms Inc.* (1933), 262 N. Y. 21, in which the court, contrasting the temporary equity receiver and the statutory receiver, said at pp. 28, 30:

"* * * Receivers of the property of a corporation are appointed pursuant to statute in actions for sequestration, in actions to annul a corporation and in other actions where violation of the law or insolvency is

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substituted for the corporation in an action of trespass brought before his appointment. *Stokes v. Hoffman House* (1901), 167 N. Y. 554 involved merely the question of the liability for rent of a temporary equity receiver appointed in an action to foreclose a mortgage covering leases and chattels. The Court (p. 560) was careful to point out the distinction between equity and statutory receivers. *Sigua Iron Co. v. Brown* (1902), 171 N. Y. 488 involved the question of whether a New York receiver appointed in proceedings ancillary to a Pennsylvania temporary equity receivership could be substituted as plaintiff in a New York action by the foreign corporation to recover unpaid calls on stock. *Mutual Brewing Co. v. New York & C. P. Ferry Co.* (1907), 123 App. Div. 149, 45 N. Y. Supp. 101 involved the right of the purchaser of a cause of action to be substituted as plaintiff in a negligence case, the cause of action having been sold *pendente lite* by the permanent receiver of the plaintiff corporation, appointed in an action to dissolve the corporation. *In re French* (1918), 181 App. Div. 719, 168 N. Y. Supp. 988, aff'd. 224 N. Y. 535, involved a proceeding to dissolve a corporation in which a permanent receiver had been appointed. The court held that it had power in this action to enjoin a proceeding to foreclose a corporate mortgage.

shown and judicial supervision of the corporation is required. Such receivers take title to all the corporate property for the benefit of all the creditors and stockholders. The appointment of a receiver of rents and profits is a not unusual incident of an action on mortgage foreclosure. The inconsistency of language may be due to a confusion of ideas. Section 150 of the General Corporation Law has to do in general with the appointment of a receiver of the general assets of an insolvent corporation named to secure equality of payment of claims due creditors by preventing priority through attachments and judgments. Such purpose is not germane to the appointment of a receiver of the rents and profits of the mortgaged property which are assigned by a mortgagor to the holder of the mortgage as additional security for the payment of the mortgage indebtedness.

"We have one kind of receiver of the property of the corporation appointed in insolvency and another kind in mortgage foreclosures who is a mere receiver of rents and profits, appointed by the court by or without the consent of parties. The former is appointed only as the Court has been given jurisdiction over corporate bodies (*U. S. Trust Co. v. New York, W. S. & B. Ry. Co., supra*). The latter is appointed without authority from statute."

This contrast in the function of, and the necessity for, the two receivers accounts for the vast differences in their rights and power. The temporary statutory receiver—in contradistinction to the equity receiver—is endowed with title to the corporate property to the extent that his trust

requires. In *Nealis* v. *American Tube & Iron Co.*, 150 N. Y. 42, the Court speaking of the powers of the temporary statutory receiver (appointed to sequester the assets of an insolvent corporation) granted by former §1788 of the New York Code of Civil Procedure (now §162 of the New York *General Corporation Law*) said:

"* * * In the case at bar the defendant corporation had secured a fraudulent preference, and the amount thus realized by it was in law the property of the New York Supply Company, and it was the duty of its temporary receiver, who was vested with all its property to sue, recover the money, if possible, and to hold it subject to the further order of the court. *It is the evident policy of the statute to vest in the temporary receiver many of the important powers that are exercised by a permanent receiver, and this for the very obvious reason that before final judgment, in an action to procure the dissolution of a corporation, it is of vital importance that the title of the corporate property should be vested in an officer of the court who has full authority to reduce it to possession wherever found and to maintain any action or special proceeding necessary in the premises.*

"In such an action it would be not only an empty form to make the insolvent corporation a defendant, but would be inconsistent with the appointment of *the temporary receiver, who for the purposes of holding, protecting and reducing to possession the property and assets of the Company, is vested with title and represents the corporation and its creditors as fully as a permanent receiver after final judgment of dissolution.*" (Italics supplied.)

It was because the temporary statutory receiver took the property—not as a mere custodian as in the case of the equity receiver, but—for the purposes of the statutory scheme of distribution that title vested in him to enable him to fulfill his trust. *Johnson* v. *Rayner* (1898), 25 App. Div. 598, 600, 49 N. Y. Supp. 959, 960; *Frank* v. *Lutton* (1944), 267 App. Div. 703; *National Park Bank* v. *Clark* (1904), 92 App. Div. 262; *Prince* v. *Schlesinger* (1906), 116 App. Div. 500; 1 *Clark, Receivers*, 2nd Ed. §345; *Converse* v. *Hamilton* (1914), 224 U. S. 243, 255; *Bernheimer* v. *Converse*, 206 U. S. 516, 534.

In view of the clear contrast in their functions, there is no basis for analogy of any one of the three types of temporary receiver with either of the others. If there is any point of similarity among the three, the temporary §977-b receiver is like the statutory receiver for a domestic corporation in that both are appointed in actions designed to marshal and distribute corporate assets. If this point of similarity justifies an analogy, it is to the temporary statutory receiver only. Such an analogy, under the cases cited *supra*, would require the holding that title vests in the temporary §977-b receiver as it does in the case of the temporary statutory receiver. In this regard both are in contrast to the temporary equity receiver.

The fact is that resort must be had to the equity practice to ascertain the powers of the temporary equity receiver. Resort must be had to the respective statutes involved to ascertain the powers of the temporary §977-b receiver or the temporary statutory receiver of a domestic corporation. *New York Title & Mortgage Co.* v. *Polk Arms, Inc.* (1933), 262 N. Y. 21.

Adverting to §977-b for Propper's rights and power and authority as temporary receiver thereunder, it is clear that he had title. Subd. 19 of §977-b so states in so many words.

Subd. 12 reinforces this conclusion in providing that "any receiver appointed pursuant to this section" is vested with "all the powers and duties * * * conferred upon receivers and trustees by the laws of the State of New York." Such powers include title to the corporate assets. *N. Y. General Corporation Law* §§168, 169.

Under the law of New York the Court has the option of conferring upon the temporary statutory receiver of a domestic corporation all the power and standing of a permanent receiver, excepting only the power to distribute (*N. Y. General Corporation Law*, §162). Under §977-b the matter is not optional. Subd. 12 of §977-b directs that the temporary §977-b receiver shall have the powers of a permanent receiver. Thus, the Legislature has merely made mandatory, in case of the temporary §977-b receiver, that which it left to the choice of the court in the case of the temporary statutory receivers for domestic corporations. The state court, in appointing Propper, so construed and applied subd. 12 of §977-b (I R. 59).

The Court of Appeals found otherwise. It held that subd. 12, despite its broad language, is to be restricted to mean that the temporary §977-b receiver takes only the powers and duties of other temporary receivers (presumably in equity) conferred by the laws of New York. This construction rests wholly on the premise, assumed by the court, that the temporary §977-b receiver is analogous to the temporary equity receiver. Since this premise is faulty, as we have shown, there is no basis for the conclusion.

Had the Court of Appeals searched the statute—instead of the old equity cases—for aid as to the meaning of subd. 12, it would have found convincing proof that the broad powers granted by subd. 12 were meant to apply to the temporary, as well as the permanent, receiver.

The grant in subd. 12 runs in favor of "any receiver appointed pursuant to" §977-b. Language so clear and unequivocal requires no construction. It was not open to the Court of Appeals, in the guise of construing this unambiguous statute, to enact a qualification of the statute not made by the New York Legislature. *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 343; *Osaka Shoshen Kaisha Line* v. *U. S.*, 300 U. S. 98, 101. "Any receiver" means either a temporary or a permanent receiver under §977-b. This is the meaning which inheres in this phrase in its usage elsewhere in the statute. Thus, in subd. 19, "Any receiver appointed pursuant to the provisions of this section" may be substituted for the corporation, may intervene in, and may revive any, action. Subd. 20 specifies the circumstances under which possession of the corporation's assets is deemed to have vested in "Any receiver appointed pursuant to this section." Conduct of suits and acquiring possession of the sequestered assets pertain alike to the functions of both the temporary and the permanent receiver. No reason is given by the Court of Appeals why the words "Any receiver etc." used in subd. 12 must be construed differently than in subds. 19 and 20. Therefore, these words must be given the same meaning in all three sections. *Pampagna Sugar Mills* v. *Trinidad*, 279 U. S. 211, 218.

Sec. 977-b specifies a procedure for marshalling and distributing the New York assets of foreign corporations. It has no counterpart in any other statute or in traditional equity practice. Its provisions are clear and well adapted to its purposes. There is no warrant for reading ambiguity or doubt into the statute by way of analogy to other temporary receiverships which are wholly different both in procedure and purpose.

Propper's Rights as Temporary Receiver—Irrespective of Whether Labeled "Title" or "Right to Possession"—Are Superior to Those of the Custodian Who Claims Only Through AKM.

In the view of the Court of Appeals, this case turned on whether Propper, as temporary receiver, took conventional "title". It held that he did not. We have, we think, demonstrated otherwise.

Assuming that Propper did not take title, the Courts below, in searching for conventional "title", begged the question to be decided. "Title" is a label—a synonym for certain rights. The genuine inquiry here is not whether the temporary receiver took "title". It is, rather, whether his rights, however labelled, were superior to those of the Custodian who took merely AKM's right, title and interest. If Propper's rights were superior, the judgment must be reversed, irrespective of whether those rights, in the aggregate, may be labelled "title" or "right to possession". So viewed, the Custodian's rights are clearly subordinate to those vested in Propper as temporary receiver.

Upon Propper's appointment as temporary receiver, and particularly after his demand on ASCAP, the ASCAP debt was in the custody of the state court for the purposes of Propper's trust under §977-b. *Palmer* v. *Texas*, 212 U. S. 118, 129; *Farmers Loan & T. Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51. The interest thus vested in Propper was superior to the lien of attaching and replevining creditors. *Matter of Christian Jensen Co.* (1891), 128 N. Y. 550, 553. Also, it was superior to the rights of a bankruptcy trustee. *In re Denton & Haskins Music Pub. Co.* (1935), 10 F. Supp. 802. So, too, as against execution creditors. *In re Lenox Corp.*, 57 App. Div. 515, affd. 167 N. Y. 623; *Wiswall* v.

Simpson, 14 How. (U. S.) 52, 68. *A fortiori*, Propper's rights to the ASCAP debt were superior to those of AKM.

It matters not how these rights are labelled. Their legal effect is the same whether they add up to conventional "title" or the "right to possession." In a liquidation proceeding such as this the right to possession without more confers an equitable title on the temporary §977-b receiver. Any title remaining in AKM would be purely formal and held in trust for Propper. *Lafayette Trust Co.* v. *Biggs*, 213 N. Y. 280, 287; *Matter of Atty. Gen.* v. *Atlantic Mutual Life Ins. Co.*, 100 N. Y. 279, 282, 1 *Clark, Receivers*, 2nd Ed., §344.

The Custodian claimed only the right of AKM. As against Propper, the temporary receiver, AKM had no right to its New York assets. *A fortiori*, the Custodian had none.

The vice of the holdings below is that they do not limit the Custodian's right to AKM's interest. They give the Custodian a standing superior to that of AKM or of an attaching creditor and, indeed, superior to that of the Supreme Court of New York itself, in whose custody the ASCAP debt was lodged for the benefit of AKM's creditors and stockholders. The judgments below did not enforce the Custodian's seizure. They created rights in the Custodian which he neither purported to, nor actually did, vest. The Courts below unwittingly enlarged the Vesting Order in the belief that they were merely executing it. This was error.

POINT III

The Freezing Controls Did Not Preclude Propper, As Permanent Receiver, From Taking The ASCAP Debt.

As permanent receiver, Propper succeeded to the property vested in himself as temporary receiver. In the latter capacity, he had taken the ASCAP debt before the freezing controls became effective as to Austrian nationals. Therefore, both as temporary and as permanent receiver he held the ASCAP debt free of these controls. Exec. Order 8389 is wholly inapplicable to this case.

The Courts below found it necessary to apply Exec. Order 8389 to this case because they mistakenly assumed that §977-b vested title in Propper only upon his appointment as permanent receiver. They held that, since this appointment came after the effective date of the Exec. Order, it was ineffective to vest Propper with title to the ASCAP debt. This holding was erroneous even if we assume as valid the mistaken notion that title to the ASCAP debt could not have vested in Propper until he was appointed permanent receiver. The difficulty with the holdings below is that they overlooked two salient points.

First, Propper's rights as permanent receiver related back to the commencement of the §977-b proceeding. Exec. Order 8389 was not then effective as against the property of Austrian nationals. *Second*, Sec. 5(b) of the Trading with the Enemy Act, on which Exec. Order 8389 rests, was not intended to, and, in fact, did not forbid the seizure of the ASCAP debt for the purposes of the §977-b proceeding.

A

Propper, As Permanent Receiver, Took Title to the ASCAP Debt as of the Commencement of the §977-b Proceeding. Therefore, His Rights as Permanent Receiver Were Unaffected By Executive Order 8389.

The extension of Exec. Order 8389 to Austrian nationals was effective on June 14, 1941 (6 F. R. 2897). It did not purport to affect property interests vested prior to this date. The ASCAP debt had been seized by the State Court, previously, on June 12, 1941 when the §977-b proceeding began.

The proceeding was one to marshal and distribute AKM's New York assets among its creditors and stockholders. As such, it was a proceeding *in rem* against all of AKM's New York assets. *Meyer* v. *Petrograd Metal Works*, 256 App. Div. 1077, *app. den.* 281 N. Y. 887; *Oliner* v. *American-Oriental Banking Corp.* 252 App. Div. 212, *aff'd.* 277 N. Y. 588.

In such cases, the rights of the interested parties in the *res* are fixed as of the commencement of the action. The assets to be dealt with are then constructively seized and in the custody of the court impressed with the rights of creditors. *Acme Harvester Co.* v. *Beekman Lumber Co.*, 222 U. S. 300, 307; *Everett* v. *Judson*, 228 U. S. 474, 478; *Fairbanks Steam Shovel Co.* v. *Wills*, 240 U. S. 642, 649; *Palmer* v. *Texas*, 212 U. S. 118, 119; *Farmer's Loan & T. Co.* v. *Lake Street Elevated R. Co.*, 177 U. S. 51; *Higgins* v. *Worthington*, 90 Hun 436, 35 N. Y. Supp. 815; *In re Berry*, 26 Barb. (N. Y.) 55; *Hall* v. *Holland House Co.*, 12 N. Y. Misc. 55, 57; *In re Denton & Haskins Music Pub. Co.* (S. D. N. Y. 1935), 10 F. Supp. 802.

The act of appointing the permanent receiver does not create the creditors' rights against the *res*. It merely supplies the means by which the trust—already impressed upon the property by commencement of the action—is executed. In this scheme, the permanent §977-b receiver is merely the arm of the Court. *White* v. *Ewing*, 159 U. S. 36, 39-40; *Porter* v. *Sabin*, 149 U. S. 473, 479.

Since Propper was appointed permanent receiver to carry out a trust which had already been impressed upon the seized property when Exec. Order 8389 became effective, his power to discharge that trust was unaffected by the Exec. Order. Propper, as permanent receiver, merely administered property theretofore vested in him as temporary receiver at the commencement of the action.[4]

B

Sec. 5 (b) of the Trading with the Enemy Act Did Not Authorize the President to Abrogate the Power of the State of New York to Deal With the ASCAP Debt Through the §977-b Proceeding.

All powers not delegated to the United States are, under the Federal Constitution, reserved to the states, or to the people. (U. S. Const., 10th Amend.; *U. S.* v. *Butler*, 297 U. S. 1, 63.) This Court has often held that the power to deal with local property and its disposition is reserved exclusively to the states. *Hervey* v. *Rhode Island Locomo-*

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4 While Propper, as permanent receiver, took title to the ASCAP debt free of the freezing controls, he could not make distribution to any blocked national until the requirements of Executive Order 8389 had been satisfied as to any such claimant. The Alien Property Custodian could vest the rights on distribution of any blocked national who was also an enemy national.

tive Works, 93 U. S. 664, 671; *Yonley* v. *Lavender*, 21 Wall. 276; *Hoyt* v. *Sprague*, 103 U. S. 613, 630; *James* v. *Draco Contracting Co.*, 302 U. S. 134, 141; *Security Trust Co.* v. *Dodd*, 173 U. S. 624, 628.

Specifically, this Court has held that the states have exclusive power to deal with the local assets of defunct foreign corporations. *Clark* v. *Williard*, 294 U. S. 211, 213. Sec. 977-b was the exercise of this exclusive power by the State of New York.

The Courts below have here permitted the Executive to abrogate this power reserved to the State of New York by the Tenth Amendment to the Federal Constitution. This result follows from the holdings below that Exec. Order 8389 must be construed to have prevented the acquisition, without license, of any interest in the ASCAP debt—whether by "judicial process" or otherwise. These holdings mean, in essence, that, after June 14, 1941, the State of New York was powerless, through the §977-b proceeding, to deal with any of AKM's New York assets unless licensed by the President.

There is grave doubt that, within Constitutional limits, Congress could, by its enactment of Sec. 5(b) of the Trading with the Enemy Act (upon which Exec. Order 8389 rests), abrogate the power of the State of New York, through §977-b, to deal with AKM's New York assets. From the time of institution of the §977-b proceeding (June 9, 1941, I R. 9, 31) until after Propper's appointment as permanent receiver (Sept. 29, 1941 I R. 56-60) this Country was at peace. Therefore, Sec. 5(b) could not be rested on the war power, invoked in 1917 when this section was originally enacted. It is clear that the reenactment of Sec. 5(b) because of the claimed national emergency, due to the invasion of Norway and Denmark, did not confer upon Congress a Constitutional power which it did not have otherwise. *Schechter* v. *U. S.*, 295 U. S. 495, 528.

However, we believe that it is not necessary to probe the Constitutional authority of Congress to enact Sec. 5(b). We believe it is clear that, in conferring authority upon the President under Sec. 5(b), Congress did not empower the President to deprive the State of New York of all power to deal with the ASCAP debt in the §977-b proceeding.

The Courts below, in holding otherwise, have rested their conclusion, exclusively, on the Treasury's General Ruling No. 12, issued under Exec. Order 8389, as construed by Public Circular No. 31, issued by the same agency. General Ruling No. 12 was issued on April 21, 1942 (7 F. R. 2991), seven months after Propper's appointment as permanent receiver and almost one year after the §977-b proceeding had been begun. Pub. Circular No. 31 was issued on August 2, 1946, more than five years after the institution of the §977-b action (11 F. R. 8351).

Exec. Order 8389, in its application to the §977-b proceeding on September 29, 1941, was a peacetime measure intended to protect the property here of the invaded countries (*infra*, pp. 44-5). On the other hand, General Ruling No. 12 and Pub. Circular No. 31 were issued long after we were at war and at a time when enemy property had become subject to the controls of the Trading with the Enemy Act and other war time legislation. These later announcements could not be employed to determine the force which inhered in Sec. 5(b) and Exec. Order 8389 on Sept. 29, 1941.

The Courts below overlooked this vital point of distinction. They gave retrospective force to General Ruling No. 12. In so doing, they thrust the full impact of the subsequent wartime legislation against the property dealt with by §977-b in time of peace. The Courts below erred in giving to Sec. 5(b), Exec. Order 8389 and Gen. Ruling 12, retrospectively, their wartime force against a peacetime trans-

action. *Miller* v. *U. S.*, 294 U. S. 435, 439. This is true here, particularly, since violations of Sec. 5(b) or executive orders or rulings thereunder carry heavy criminal penalties. Exec. Order 8389, §8; *Addy Co.* v. *U. S.*, 264 U. S. 239, 244-5.

The problem here is to determine whether Congress, by Sec. 5(b) enacted in time of peace, empowered the President to abrogate the reserved power of the State of New York to deal with the ASCAP debt, in any way, in the §977-b proceeding.

The extension of the federal controls of Sec. 5(b) into the domain reserved to the State of New York by the Federal Constitution is, at best, a delicate exercise of legislative policy. *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144, 154, 155; *Yonkers* v. *U. S.*, 320 U. S. 685, 690; *Palmer* v. *Massachusetts*, 308 U. S. 79, 84. §977-b "enacted in execution of a reserved power of the state is not to be regarded as inconsistent with" Sec. 5(b), "unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 623. The "purpose to displace the local law must be definitely expressed." *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85.

Congress did not empower the President to strike down §977-b nor did he attempt to do so. On the contrary, the plan of §977-b dovetailed neatly into the scheme of federal controls envisioned by Sec. 5(b). This is manifest from the history of Sec. 5(b), the Congressional intention underlying it and the manner in which it has been construed and applied administratively and by the New York courts.

1. The History of Sec. 5(b).

Sec. 5(b) was enacted originally in 1917 as part of the Trading with the Enemy Act (40 STAT. 411; Sec. 5b). It was a catch all—enabling control of transactions not otherwise controlled by the Trading with the Enemy Act. The end of the first World War terminated the effectiveness of Sec. 5(b) as well as the other controls of the Trading with the Enemy Act.[5]

Sec. 5(b) was revived on March 9, 1933, to meet the domestic crisis engendered by the depression. On that day, it was amended so that the powers granted would be available to the President during time of war or "during any other period of national emergency declared by the President" (48 STAT. 1). This amendment was directed to the domestic crisis solely. In respect to credits, the 1933 amendment authorized the President to regulate "transfers of credit between or payments by banking institutions as defined by the President." The obvious purpose was to enable the President to suspend payments by the banks to avoid the then current runs on the banks and, thus, to halt the alarming number of bank failures.[6]

The authority given by Sec. 5(b) was invoked next on April 10, 1940 when Germany invaded Denmark and Norway. By Exec. Order 8389 (issued April 10, 1940, 5 F. R.

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5 Sec. 5(b) had been amended twice during the first World War. First, it was amended to extend the President's power to regulation of the export of silver (40 STAT. 535; April 23, 1918). Later, it was amended again to extend the regulatory power to the hoarding of gold and transactions in Government bonds (40 STAT. 966, September 24, 1918).

6 The President made peacetime domestic use of these powers, during the depression, on two occasions—in the Banking Holiday (31 Code Fed. Regs. [1939] §120.1) and in support of the Government's gold policy (31 Code Fed. Regs. [1939] §§50.1 to 50.11).

1400, as an amendment to Exec. Order 6560, dated January 15, 1934) the President froze property in the United States in which "Norway or Denmark or any national thereof has at any time on or since April 8, 1940 had any interest."

Immediately, the question arose as to whether the freezing controls applied to immobilize stocks and other securities. Prior to March 9, 1933, Sec. 5(b) had included stocks and securities within the regulatory power given to the President (40 STAT. 966). The amendment of March 9, 1933, permitting exercise of the regulatory power in peacetime national emergencies, had removed from Sec. 5(b) all reference to "evidence of indebtedness or of the ownership of property."

The Secretary of the Treasury had taken the position that, despite the omission, Exec. Order 8389 applied to stocks and other securities (Gen. Ruling No. 2; 5 F. R. 1474). But the authority of the President to regulate transfers of stocks and bonds was questioned because of the omission.[7] To restore the omission so that Sec. 5(b) would apply to stocks and other securities, and to confirm its use to freeze property in the United States belonging to Norwegian and Danish nationals, Senator Wagner introduced into Congress the Joint Resolution, enacted on May 7, 1940 (54 STAT. 179; Appendix, pp. 64-5). Exec. Order 8389 was an exercise by the President of the authority granted by this Joint Resolution. Initially, this Executive Order dealt with the local assets of Danish and Norwegian nationals. On June 14, 1941, the President extended its application to nationals of Austria, among others (6 F. R. 2897).

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7 H.R. No. 2009, 76th Cong. 3rd Sess. 1940; S.R. No. 1946, 76th Cong. 3rd Sess. 1940; Sen. Wagner in 86 Cong. Rec., pg. 5006.

2. The Joint Resolution Did Not Empower the President to Suspend the Operation of §977-b of the N. Y. Civil Practice Act.

The extent of the impact of Exec. Order 8389 on the §977-b proceeding against AKM depends upon the scope of the authority granted to the President by the Joint Resolution of May 7, 1940 (54 STAT. 179) and the extent to which he exercised that authority. In no event could Exec. Order 8389 have force beyond the power granted to the President by the Joint Resolution. *Miller* v. *U. S.*, 294 U. S. 435, 440; *Campbell v. Galeno Chemical Co.*, 281 U. S. 599, 610.

The President did not attempt to exceed the power vested in him by the Joint Resolution. In fact, in Sec. 1 of Exec. Order 8389 (issued April 10, 1940, 5 F. R. 1400, as amended June 14, 1941, 6 F. R. 2897) he paraphrased the Joint Resolution as follows:

> "SECTION 1. All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury by means of regulations, rulings, instructions, licenses, or otherwise, if (i) such transactions are by, or on behalf of, or pursuant to the direction of a foreign country designated in this Order, or any national thereof, or (ii) such transactions involve property in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest of any nature whatsoever, direct or indirect:

A. All transfers of credit between any banking institutions within the United States; and all transfers of credit between any banking institution within the United States and any banking institution outside the United States (including any principal, agent, home office, branch, or correspondent outside the United States, of a banking institution within the United States);

B. All payments by or to any banking institution within the United States;

C. All transactions in foreign exchange by any person within the United States;

D. The export or withdrawal from the United States, or the earmarking of gold or silver coin or bullion or currency by any person within the United States;

E. All transfers, withdrawals or exporations of, or dealings in, any evidences of indebtedness or evidences of ownership of property by any person within the United States; and

F. Any transaction for the purpose or which has the effect of evading or avoiding the foregoing prohibitions."

Nothing in this Exec. Order or in the Joint Resolution suggested that the states were to be deprived of all power to deal with local assets in which affected foreign nationals had an interest. In fact, nothing in either suggested that dealings in New York with a credit such as the ASCAP debt was comprehended by the Exec. Order. The seizure

of the ASCAP debt in the §977-b proceeding was not a transfer "of credit between any banking institutions" under Sec. 1A of the Exec. Order. Plainly, it was not a transaction "in foreign exchange" nor did it involve "The export or withdrawal * * * or the earmarking of bullion or currency" (Exec. Order 8389, Secs. 1, C and D). Further, the reference in Sec. 1E of the Exec. Order to "evidences of indebtedness or evidences of ownership of property," related solely to stocks and other securities (*supra*, p. 40).

It would seem clear, too, that, in dealing with the ASCAP debt, the §977-b proceeding did not involve "payments by or to any banking institution" within the meaning of Sec. 1B of the Exec. Order. However, the President in Sec. 5F of the Exec. Order defined "banking institution" to include persons engaged in the business of banking or foreign exchange "or any person holding credits for others as a direct or incidental part of his business." The definition obviously was intended to apply to persons dealing in credits. ASCAP could hardly be said to be engaged in such a business. However, respondent successfully argued below that ASCAP was a "banking institution" within this definition and that, therefore, payment of the ASCAP debt was subject to regulation under Sec. 1B of the Exec. Order relating to "payments by * * * any banking institution."

Assuming the correctness of respondent's construction of Sec. 1B, the issue is narrowed to this: Did Sec. 1B of the Exec. Order, relating to "payments by * * * any banking institution" destroy the power of the State of New York to deal with the ASCAP debt, in any way, in the §977-b proceeding? The answer must be in the negative.

Sec. 1B of the Exec. Order is taken almost *verbatim* from the Joint Resolution. The former was effective only to the extent of the power granted by the latter. *Miller* v. *U. S.*, 294 U. S. 435, 440; *Campbell* v. *Galena Chem. Co.*, 281 U. S.

599, 610. The Joint Resolution did not define the extent or limits of this power or the effect upon bank credits of exercise of the power by the President. The legislative materials, however, make it clear that, in granting power to regulate payments by banking institutions, Congress did not empower the President to prohibit legitimate dealings with credits.[8]

The Joint Resolution was offered in Congress by Senator Wagner, Chairman of the Committee on Banking and Currency, which had reported out the Resolution. In his own words,

> "* * * The purpose of the joint resolution, of course, is very clear. We want to protect property within the jurisdiction of the United States which is owned by these governments [Norway and Denmark] or their nationals." (86 CONG. REC. 5006.)

The other sponsors of the Joint Resolution were in agreement as to its purpose. Senator Glass said,

> "* * * The plain intent of the joint resolution, as the Senator knows perfectly well, is to prevent Germany from appropriating the property now in the United States belonging to the two nations she is now overwhelming. No other suggestion was made at all." (86 CONG. REC. 5175-5176.)

Senator Connally added,

> "And is not this measure for the purpose of preventing change of title of the property here in the

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8 To ascertain the Congressional purpose we may seek "enlightenment from reports of the Congressional Committees and explanations given on the floor of the Senate and House by those in charge of the measure." *Wright* v. *Mountain Trust Bank*, 300 U. S. 440, 463, and note 8; *Richbourg Motor Co.* v. *U. S.*, 281 U. S. 528, 536.

United States by conquest, or by any other forcible or violent means?" (86 CONG. REC. 5007.)

It was clear, too, that the Joint Resolution did not prohibit legitimate transactions. Senator Wagner emphasized this as follows:

"Mr. Wagner. * * * I wish to emphasize the point that *this does not absolutely prohibit the transfers, it merely provides that the Government may investigate* to determine whether the transfer was made voluntarily or under duress, to be perfectly candid. *If the transfer is voluntarily made, our Government, of course, will in no way interfere.* But where the transfer is induced, as can be easily established, by duress, we have a right to protect the national of any country against that sort of an imposition, using a very mild term, with respect to securities and other evidences of ownership subject to our laws." (86 CONG. REC. 5007.) [Italics supplied.]

* * * * *

"Mr. Wagner. *The joint resolution does not absolutely prohibit any transaction. It simply contemplates, if an Executive order is issued, that each transaction be scrutinized to determine whether it was bona fide or accomplished through duress.*"

"Mr. Barkley. That is right." (86 CONG. REC. 5175-5176.) [Italics supplied.]

The Joint Resolution was not intended to interfere with the rights of American citizens to enforce their claims against the property subject to regulation. Thus, Senator Barkley said:

"Mr. Barkley. It should also be stated—and I am sure the Senator omitted it by oversight—that the joint resolution is intended not only to protect the nationals of Norway and Denmark who have interest in stocks, securities, and other property in the United States, but it is also intended to protect American citizens in the event they have claims of any sort growing out of these transactions, and therefore we preserve the property not only for its owners but for the benefit of Americans who may have claims.

"Mr. Wagner. Yes; we are also protecting the banks which may be called upon to make transfers of securities." (86 Cong. Rec. 5006.)

It is evident that the Joint Resolution was enacted to enable the President to ascertain whether a given transaction was the result of "conquest" or "any other forcible or violent means." It "does not absolutely prohibit any transaction." Any Executive Orders issued were to enable "each transaction [to] be scrutinized to determine whether it was bona fide or accomplished through duress." If the transfer were genuine, our Government was to "in no way interfere." In addition, the blocked property was to be available for "the benefit of Americans who may have claims."

The expressed Congressional purpose was purely and simply to protect nationals of Norway and Denmark—and, later, other invaded countries—from being forced to give up, at the point of German guns, property situated in the United States. To this end, the President was given power to screen transactions involving such property. Genuine transactions and the claims of Americans against such property were to be unaffected.

This Congressional intention is the law. It matters not that it is not spelled out in the Joint Resolution in so many words. It would be so even if the statute, read literally, suggested a contrary purpose. In court, the Congressional intent alone has the force of law. *Hawaii* v. *Mankichi*, 190 U. S. 197, 212; *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 391; *Johnson* v. *U. S.* (C. C. A. 1st, 1908), 163 Fed. 30, 32; *U. S.* v. *Dickerson*, 310 U. S. 554, 562; *U. S.* v. *American Trucking Association*, 310 U. S. 534, 543-544.

From the Congressional intent underlying the Joint Resolution, it is clear that Congress did not abrogate the power of the states to deal with property within their borders. The Joint Resolution did not expropriate blocked accounts to the United States or to anyone else. It did not in any way proscribe the change of title to blocked funds so long as the ultimate act necessary to consummate the transaction, namely, payment, was suspended until a license had been secured.

New York's seizure of title to the ASCAP debt in the §977-b proceeding was wholly consistent with the language and purpose of the Joint Resolution. The seizure gave jurisdiction to the N. Y. Supreme Court to continue with the proceeding. But payment of the debt became subject to the screening process envisioned by the Joint Resolution. Thus, the §977-b proceeding could go forward without impinging, in any respect, the purpose of the Joint Resolution.

On the contrary, through the §977-b proceeding the purpose of the Joint Resolution would be better served. Through its receiver, Propper, the State Court would sift the claims filed. Those filed by, or on behalf of, blocked nationals could not be paid until screened under Exec. Order 8389. In this regard, Propper, as receiver, would have the same duty as ASCAP to respect the Federal

freezing controls. However, the claims of American citizens could be honored, precisely as Congress intended. In this way, §977-b complemented the Federal controls. It supplied—what the Federal controls then lacked—machinery which would enable American citizens to satisfy their legitimate claims out of blocked property while, simultaneously, claims of blocked nationals were suspended until screened under Exec. Order 8389.

Not one dollar of the ASCAP debt was any the more likely to reach the Axis governments through the §977-b receivership than through ASCAP itself. On the contrary, this result was less likely in the §977-b receivership since the state court was charged with the duty, equally with the Courts of the United States, of enforcing the objective of the Joint Resolution. *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 479.

In striking down §977-b, the courts below have done more than merely carrying out the purpose of the Joint Resolution to place the property of blocked nationals beyond the German invader. They have gone far beyond this purpose by placing such property beyond the reach of the legitimate claims of American citizens. To this extent, the judgment below has defeated the expressed purpose of Congress to protect such legitimate claims.

Plainly, §977-b is wholly in harmony with the Joint Resolution. The courts below should not have abrogated its application to the ASCAP debt. *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 623; *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 85.

3. As Construed by the Federal Executive and the New York Courts, The Joint Resolution Permitted §97.3b to Vest Title to the ASCAP Debt in Propper as Permanent Receiver.

The effect of Exec. Order 8389 upon the power of the State of New York to deal with blocked funds was determined by the Court of Appeals of New York in *Polish Relief Comm.* v. *Banca Nationala A. Rumaniei,* 288 N. Y. 332. There, the plaintiff, acting under the Attachment statutes of the State of New York (N. Y. *Civil Practice Act,* §§902-973), sued the defendant by attaching its bank account in New York City. There, as in the instant case, the proceeding was wholly *in rem*. In the *Polish Relief* case, the Treasury Department had denied a license for which the plaintiff had applied after the commencement of the attachment action. The defendant contended that the freezing controls precluded unlicensed seizure by attachment. The United States, appearing as *amicus curiae* urged that the attachment was valid. The N. Y. Court of Appeals sustained the attachment, saying at p. 338:

> "The Executive Order did not forbid attachment of the conceded interest of the defendant in the credits upon which the levies were made. For all we know, payment of the blocked accounts to the credit of this action can be permitted consistently with the purpose of the Order. We are not to presuppose that this will inevitably be refused in the event of a judgment for the plaintiff [citations]. The lien of an attachment is always hypothetical in some degree. A 'seizure subject to license' was, we think, sufficient for the purpose of jurisdiction in rem over the deposits in question."

The N. Y. Court of Appeals reached this conclusion on the basis of the Treasury's interpretation of Executive Order 8389, saying at p. 338:

> "The dissenting opinion calls upon us to say a word more. As amicus curiae, the government of the United States informs us of its decision that the levies of this attachment do not offend any national policy implied by the Executive Order. We do not presume to contradict this executive determination. See United States v. Pink, 315 U. S. 203."

The United States made it clear in the *Polish Relief* case that the freezing controls did not abrogate the power of the state to deal with blocked accounts but that payment out of the blocked account to satisfy a judgment was subject to the screening process. Thus, the brief of the United States in the *Polish Relief* case states as follows at p. 39:

> "From the very inception of freezing control, litigants, prior to commencing attachment actions against funds belonging to blocked nationals, have requested the Secretary of the Treasury to license a transfer to the sheriff by attachment. In all those cases, running into the hundreds, the Treasury Department has taken a consistent position. The Treasury Department has authorized the bringing of an attachment action. However, the Treasury Department has not licensed a transfer of the blocked funds to the sheriff prior to judgment.
>
> "In response to requests that a license be issued to transfer the attached funds prior to judgment, the Treasury Department has, in practice, made a statement of the following nature:

> Under Executive Order No. 8389, as amended, and the Regulations issued thereunder, no attempt is made to limit the bringing of suits in the courts of the United States or of any of the States. However, should you secure a judgment against one of the parties referred to in your letter, which is a country covered by the Order, or a national thereof, a license would have to be secured before payment could be made from accounts in banking institutions within the United States in the name of such country or national.
>
> "From the terms of the statement, it may be clearly seen that the Secretary of the Treasury authorized the bringing of an attachment action. * * *"[9]

In so ruling, the Secretary of the Treasury was acting under the authority granted in Sec. 1 of Exec. Order 8389 to authorize transactions "by means of regulations, rulings, instructions, licenses or otherwise".

The Courts of the State of New York have consistently followed this ruling and interpretation of the Joint Resolution and the Exec. Order. They have held, in many cases, that they have power to entertain litigation respecting blocked accounts but that they would not order payment out of a blocked account to satisfy a judgment until the

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9 The Government, in the *Polish Relief* case, argued in support of the power of the New York courts to attach blocked funds, saying in its brief in that case at page 39:

> "The following portion of the Brief is offered as a suggestion that the courts of the State of New York do have jurisdiction to litigate by attachment of blocked properties the rights and liabilities of litigants, consistent with the administration by the Federal Government of the freezing control laws."

payment had been subjected to the scrutiny contemplated by the Joint Resolution. *Singer* v. *Yokahama Specie Bank*, 293 N. Y. 543, in which the U. S. appeared as *amicus*; *Leeds* v. *Guaranty Trust Co.*, 65 N. Y. S. 2d 431, *aff'd.* 272 App. Div. 909, 72 N. Y. S. 2d 409, *aff'd.* 297 N. Y. 1019, in which the U. S. appeared as *amicus*; *Metallo-Chemical Corp.* v. *Banque Transatlantique S.A.*, 188 N. Y. Misc. 596; *Bollack* v. *Societe General etc.*, 263 App. Div. 601, 33 N. Y. S. 2d 986, 990; *R. & E. Goldmuntz, Sp'l.* v. *Fisher*, 54 N. Y. S. 2d 635; *Drewry* v. *Onassis*, 188 N. Y. Misc. 912, 914, 69 N. Y. S. 2d 850, 851, *aff'd.* 272 App. Div. 870, 72 N. Y. S. 2d 262; *Cable & Wireless, Ltd.* v. *Yokahama Specie Bank*, 191 N. Y. Misc. 567, 79 N. Y. S. 2d 597; *Suomen Pankki* v. *Bell*, 80 N. Y. S. 2d 821, 829.

Respondent, Clark, has himself acknowledged the power of the state to deal with blocked funds, so long as payment is subjected to the screening process. It is a matter of record in *Clark* v. *Chase National Bank, et al.*,[10] Civil No. 44-617, lately pending in the Southern District of New York, that respondent, Clark, there stipulated, in part, as follows regarding the effect of the freezing controls:

> "6. From the inception of 'freezing' controls, the Secretary of the Treasury in administering the 'freezing' control program adopted the position, in response to numerous requests made of him, that the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property found within the jurisdiction of the court which issued the warrant were not forbidden but that a license was

[10] Cited in footnote 4 of respondent's memorandum in answer to the petition for certiorari.

required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action.

"7. The Treasury Department has at various times issued licenses authorizing payment out of a blocked account of a blocked national for the purpose of making payment on a judgment recovered in an action where a prior warrant of attachment was issued and levied upon the blocked account of a blocked national therein notwithstanding that a particular license to institute the action and levy the attachment was not procured by a plaintiff and judgment-creditor. A license to institute the action and levy the attachment was in fact not required by the Treasury Department."

The Congress, the United States and the Courts of New York have all concurred in construing the Joint Resolution to permit the states to deal with blocked funds so long as the ultimate consummation of the transaction was subjected to the screening process. Therefore, it was competent for the State of New York, through §977-b, to vest the ASCAP debt in Propper as permanent receiver, so long as payment was subject to the scrutiny and license of the Federal executive. The contrary holdings below have erroneously construed Exec. Order 8389 to vest powers in the Executive which exceed those granted by the Joint Resolution.

CONCLUSION

The judgments of the Court of Appeals and of the District Court should be reversed.

Respectfully submitted,

A. WALTER SOCOLOW,
Counsel for Petitioner.

JOSEPH M. COHEN,
On the Brief.

APPENDIX

New York Civil Practice Act

(pp. 39-48 I. R.)

Sec. 977-b. *Receivers to liquidate local assets of foreign corporations.* 1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise.

2. Such action may be commenced by any domestic or foreign creditor, judgment creditor or attachment creditor or stockholder of such corporation, or by any plaintiff on whose behalf a warrant of attachment against the property of such corporation has heretofore been or may hereafter be issued.

3. Service of the summons in such action may be made personally within the state of New York, by delivery of the same to any officer or director of the corporation, or by publication pursuant to an order obtained as hereinafter provided.

4. Upon an affidavit reciting that personal service of the summons cannot be effected within the state of New York with due diligence and upon a summons and verified com-

plaint alleging that the defendant is a foreign corporation and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible within the state and that such corporation has been dissolved, nationalized, or that its charter or organic law has been suspended, repealed, annulled or revoked, or that it has ceased to do business, plaintiff may apply, without notice to the supreme court or any judge or justice thereof for the appointment of a temporary receiver pending the determination of the action and the court must thereupon appoint such receiver who shall, from time to time, file such undertakings as the court may direct and shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court.

5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon a verified complaint containing the allegations set forth in subdivision four hereof, and upon an affidavit reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation or against whom a claim or demand in favor of such foreign corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver.

6. The order directing service of the summons shall require the publication thereof in two newspapers published in the state of New York in the English language at least once a week for six successive weeks, and shall also require the mailing on or before the date of the first publication of a copy of the summons, complaint and order to the corporation at its last known principal or head office in the state or country of its domicile.

7. In an action pursuant to this section the summons must be served personally or an order directing service thereof by publication must be obtained and the first publication thereof made within sixty days after the appointment of the temporary receiver, and if served by publication, the service must be made complete by the continuance thereof.

8. If served by publication, service of the summons shall be deemed complete ten days after the date of the last publication. The action shall be deemed commenced upon the issuance of the summons. The order appointing the receiver and the papers upon which the same is granted shall be filed in the office of the clerk of the court where the action is triable within ten days after the order is made.

9. In the event an answer is interposed on behalf of the defendant, any party to the action may at any time apply for and shall be entitled to an order setting the case down for trial on a day certain as a preferred cause.

10. In the event that the defendant defaults in answering, or if after a trial the court is satisfied that the defendant has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, liquidated

or nationalized, or its charter or organic law has been suspended, repealed, revoked or annulled, the court must thereupon direct judgment, appointing a permanent receiver and directing the receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said defendant, in the manner herein provided for.

11. Such judgment shall direct that the receiver shall, as speedily as possible, reduce to cash all the assets, credits, choses in action, and other property, tangible and intangible, of the said defendant which it may have or be entitled to or may be entitled to claim or to receive in the state of New York, and shall direct said receiver to give notice to all creditors and other persons interested in the said defendant, in such manner as the court may direct and requiring them to present to the receiver proof of their claims against or interests in the said defendant within a time limited in the said judgment, which time shall not be less than sixty days after the giving of such notice. Proofs of claim shall set forth the address of the claimant and the name and address of claimant's attorney, if any.

12. Any receiver appointed pursuant to this section shall have all the powers and duties, in addition to those herein provided for, as are possessed by and conferred upon receivers and trustees by the laws of the state of New York.

13. After the expiration of the time limited by the judgment for the filing of claims with the receiver, the receiver shall prepare and submit to the court a detailed account showing the assets received, the disposition thereof and the value of any claims or assets which have not theretofore been reduced to cash, with a full description of each, and

a statement showing the name and address of his attorney, if any, and the amount and the nature of the claim, and a statement of the allowance or disallowance thereof, and a statement of the costs and expense of the action and of the receivership.

14. Notice of the filing of such account shall thereupon be given to all persons or their attorneys who have appeared in the action or filed claims with the receiver, by mail to the address set forth in the proof of claim or notice of appearance together with notice that on a date specified therein not less than thirty days thereafter, an application will be made to the court for settlement of the receiver's account and for partial distribution in the event all the assets are not reduced to cash and for full distribution in the event the assets have theretofore been reduced to cash, together with notice of the amounts which have been paid or will be applied for as costs, expenses, commissions and allowances.

15. Upon the return date of such application, or at such other time fixed by the court, the parties and claimants may be heard and proof taken and the receiver's account settled by the court or by a referee appointed for that purpose by the court.

16. Upon settlement of the receiver's account, the court must direct payment in the following order and manner:

a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the

plaintiff his reasonable expenses including attorneys' fees in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state prior to the commencement of an action pursuant to this section, shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with their stockholdings, or in the discretion of the court, to the receiver or liquidator, if any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto.

17. Thereafter and as often as practicable the receiver shall file further accounts and give notice thereof as provided in subdivision fourteen hereof until the assets are entirely liquidated and distributed as hereinbefore provided.

18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation or annulment of its charter or organic law, and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action or for the assertion of a claim therein by or on behalf of or against said corporation or by or against said receiver, whether or not said action or claim has heretofore been barred by any statute of limitations of this state or of any other state or country.

19. Title to all assets, credits, choses in action and property, tangible and intangible, of any kind and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. The existence of such corporation and causes of action of or against such corporation existing at the time of its liquidation, dissolution, nationalization, expiration of its existence, repeal, suspension, revocation or annulment of its charter or organic law, or arising thereafter shall not be deemed ended, abated or affected thereby, nor shall actions brought by or against such corporation or a receiver appointed hereunder or any remedy therein be deemed to have ended or abated or to have been affected by reason of such liquidation, dissolution, nationalization, expiration of its existence or suspension, repeal, revocation or annulment of its charter or organic law. This provision shall apply to all property, tangible and intangible, debts, demands, and choses in action of such corporation within the state of New York, and to all litigation heretofore or hereafter brought in the courts

of the state or of the United States to which the corporation or the receiver of said corporation appointed pursuant to the provisions of this section is a party. Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may intervene in any action or proceeding which relates to or affects any of the assets or claims of the corporation and may revive any action which shall have heretofore or which may hereafter have abated, and such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extra-territorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state. Nothing contained in this subdivision shall be deemed to validate claims for or causes of action or actions to recover property located in or moneys payable in the domicile of the corporation which are unenforcible under the laws of such domicile.

20. Any receiver appointed pursuant to this section shall be deemed to have obtained possession of all assets, credits, choses in action and property, tangible and intangible, of the said foreign corporation, by causing to be delivered to and left with the person, firm or corporation holding the same or against whom the claim or demand exists, a copy of the order appointing said receiver together with a demand therefor.

21. If any receiver or trustee has heretofore been appointed in this state for such corporation or its property in any action or proceeding, either before or supplementary to judgment, otherwise than in an action brought pursuant to this section, such receiver or trustee may be appointed or continued as the receiver in any action brought pursuant to the provisions of this section.

22. The appointment of a receiver pursuant to this section or the pendency of an action for the appointment of such receiver, shall until such receiver shall be discharged or until such action shall have terminated, be a bar to any subsequent application or action for the appointment of a receiver of the assets of the same corporation.

23. An action must be commenced under this section within three years from the effective date of this act or within three years from the discovery by the plaintiff or his predecessor in interest, of any asset of said corporation in the state of New York, whichever date is the later.

24. The terms "property" and "assets" as used in this section shall be deemed to include, but shall not be limited to, claims against persons, firms or corporations residing, sojourning or doing business in the state.

25. If any of the provisions of this act or the application thereof to any person or circumstances be held invalid, such invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared separable.

JOINT RESOLUTION of May 7, 1940, 54 Stat. 179:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first sentence of subdivision (b) of section 5 of the Act of October 6, 1917 (40 Stat. 411), as amended, is hereby amended to read as follows:

"During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations, as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by or to banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, and any transfer, withdrawal or exportation of, or dealing in, any evidences of indebtedness or evidences of ownership of property in which any foreign state or a national or political subdivision thereof, as defined by the President, has any interest, by any person within the United States or any place subject to the jurisdiction thereof; and the President may require any person to furnish under oath, complete information relative to any transaction referred to in this subdivision or to any property in which any such foreign state, national or political subdivision has any interest, including the production of any books of account, contracts, letters, or other papers in connection therewith in the custody or control of such person, either before or after such transaction is completed."

SEC. 2. Executive Order Numbered 8389 of April 10, 1940, and the regulations and general rulings issued thereunder by the Secretary of the Treasury are hereby approved and confirmed.

SEC. 3. Nothing in this Joint Resolution shall be deemed to repeal or to modify in any manner any of the provisions of the Act of April 13, 1934, 48 Stat. 574 (the Johnson Act) or of the Neutrality Act of 1939 (Public Resolution Numbered 54, Seventy-sixth Congress).

Approved, May 7, 1940.